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## LEGAL BRIEF

### Senate Bill 319 – Allow real estate agents to represent multiple sellers or buyers

#### James Bowditch, MAR General Counsel

Senate Bill 319 has been proposed by the Montana Association of REALTORS® in response to the Montana Supreme Court's opinion in *ZuaZua vs. Tibbles, et al.* which was decided on December 21, 2006. In that case, the court determined that Montana statutory law, as drafted, prohibits a real estate agent from simultaneously representing two buyers "competing" for the same property.

*ZuaZua* involved an agent who represented two buyers both interested in a specific parcel of property located on Flathead Lake in Polson, Montana. On July 8, 2003, the Plaintiff, Amador F. ZuaZua ("ZuaZua") presented a written offer to the seller of this property. On July 12, 2003, while ZuaZua's offer was being considered by the seller, a second offer was presented to the seller that was prepared by the same agent but on behalf of another buyer. Ultimately, the seller accepted the second offer over ZuaZua's offer. As a result of his offer being rejected by the seller, ZuaZua filed suit against the real estate agent claiming that Montana law prohibits a real estate agent from simultaneously representing two buyers who are interested in the same property.

The current Montana statutory law states that "[a] buyer agent is obligated to the buyer to act solely in the best interest of the buyer." MCA § 37-51-313(4)(a). In its decision, the Montana Supreme Court held that "a buyer agent breaches his or her obligation to a buyer under § 37-51-313(4), MCA when a buyer agent simultaneously represents more than one buyer competing for the same property."

**I. Legal Issues.** The primary issues with the rule of law as set forth by the court's opinion is that the opinion is very general and provides little guidance to licensees regarding when the prohibition applies. Specifically:

- The opinion provides no certainty as to when two buyers are deemed to be "competing" for the same property.
- The opinion does not provide any suggestion concerning what an agent should do if a situation arises when an agent represents two or more buyers who are competing for the same property. In other words, can an agent refer one of the buyers to another agent in the same office or must the buyer be referred to an agent not affiliated with the office of the agent who is doing the referral?

- The decision appears to be centered around a conflict perceived by the Supreme Court similar to conflicts that exist when an agent represents both a buyer and a seller in a dual agency capacity. As noted by the court, however, under the existing statute "the buyer agent, unlike the dual agent, would not be obligated to disclose the conflict. . ." It therefore appears that the court's concern with any conflict of interests is based on the fact that said conflict is not required by Montana law to be disclosed to buyers and/or consented to by the buyers. The proposed legislation set forth in Senate Bill 319 would provide this mandatory written disclosure and written consent.
- Other states which have been surveyed allow a buyer agent to represent two buyers competing for the same property provided the agent gives written disclosure and obtains written consent. In fact, the proposed legislation is somewhat modeled after the legislation currently in effect in the State of Oregon.
- As in the past, the legislation proposed in Senate Bill 319 will address potential conflicts of interest by clearly defining the duties imposed upon a real estate agent.
- As noted by the dissent, the majority opinion appears to lead to a collision with the interpretation of the administering agency, the Montana Board of Realty Regulation. Specifically, the Board of Realty Regulation has adopted a regulation which acknowledges that a buyer agent may represent more than one buyer within the same transaction:

"Licensee acting as listing agent shall not disclose the name of a person making an offer or the amount or terms of an offer to other persons interested in making offers except that this shall not prohibit the listing agent from disclosing that an offer has been made." ***If a buyer broker has principals making offers on the same property, the buyer broker can not tell a buyer the terms and provisions of the competing buyer's offer.***  
ARM 24.210.641(p) (emphasis added).

**II. Practical Issue.** In addition to the legal issues set forth above, there are practical issues imposed upon real estate agents by the opinion. These issues, at least as identified by me as legal counsel for the Montana Association of REALTORS®, are set forth below.

- The opinion arguably will encourage agents not to enter into agreements with potential buyers until the agent has determined that the buyer is in fact interested in making an offer on a particular piece of property. This is contrary to advice previously provided that a buyer agency agreement should be entered into upon a real estate agent determining that they will be providing representation and assistance to a buyer.
- A significant issue exists concerning the referral of one or more buyers by an agent who is representing multiple buyers who are interested in

competing for the same property. An agent will need to determine which buyer to refer out. Moreover, it is likely that these buyers will have established long standing relationships with the agent. Having to refer a buyer out as a result of this potential conflict could pose unintended difficulties on a buyer who has to work with a new agent who has no relationship or knowledge as to the buyers' history, desires or preferences with respect to property.

- The effect of the decision arguably restrains an agent from representing more than one principal at any given time. This interpretation has long and far reaching consequences for the real estate industry, most of which will adversely affect buyers and sellers. This is especially true in rural areas where there may be limited agents to represent multiple buyers.

In conclusion, the concern of the majority in the opinion of the Supreme Court appears to be based on the existence of a conflict of interest which has not been disclosed to a buyer and which has not been consented to by the buyer. The legislation proposed in Senate Bill 319 will not only require the providing of written disclosure and consent but will address the practical difficulties currently faced by real estate licensees due to the general nature of the opinion issued by the Supreme Court in *ZuaZua*.